

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

3/362

FILE: B-218097

DATE: June 3, 1985

MATTER OF: Northwest Forest Workers Association;
Second Growth Forest Management, Inc.

DIGEST:

1. Under the Competition in Contracting Act of 1984 and GAO's implementing Bid Protest Regulations, a trade association which itself is not an "actual or prospective bidder or offeror" is not an interested party and, therefore, does not have standing to protest.
2. Where a solicitation for reforestation work already requires a contractor to possess, prior to commencing work, a specific state license which may be obtained only by applicants presenting proof to the state that workers' compensation insurance will be provided, the competitive prejudice suffered by a prospective bidder who alleges that it cannot economically compete with others who may violate state law unless the solicitation also includes a contractual requirement that the contractor maintain workers' compensation insurance, is too remote and speculative for GAO to resolve the question of whether a solicitation lacking such a requirement is defective.

The Northwest Forest Workers Association and Second Growth Forest Management, Inc. have jointly protested the terms of invitation for bids (IFB) No. R6-7-85-1, issued by the Forest Service, Department of Agriculture, for the planting of government-furnished tree seedlings at the Ochoco National Forest in Prineville, Oregon. The protesters contend that the solicitation is defective because it lacks provisions which would make it a contractual requirement that the contractor provide and maintain during performance of the contract workers' compensation insurance (in addition to other coverages) and that the contractor certify to the contracting officer, in writing and prior to commencing work under the contract, that it had obtained such insurance.

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We dismiss the protest of the Northwest Forest Workers Association. Since the Association is not an actual or prospective bidder it does not qualify as an "interested party" within the context of our Bid Protest Regulations. Although Second Growth is a prospective bidder, we conclude that the issue it has raised is without merit.

At issue in this case is whether contracts for reforestation work in national forests should contain provisions obligating the contractor to obtain and provide workers' compensation insurance and to certify to the contracting officer prior to the commencement of work that such insurance has been obtained. The protesters assert that these should be contract requirements because a contractor who lacks such coverage (1) exposes the federal government to liability; (2) does not provide financial protection to its employees who are injured; and (3) enjoys a financial advantage over its competitors who obey the law by obtaining and paying for such coverage. In addition, the protesters assert that since the present IFB contemplates a fixed-price contract, or contracts, each exceeding \$10,000 in value for work to be performed on a "government installation"--i.e., a national forest--all three of the conditions prescribed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.310 (1984), have been met for the insertion in the IFB of the clause "Insurance--Work on a Government Installation (APR 1984)" (FAR, 48 C.F.R. § 52.228-5). This clause provides, in pertinent part:

"INSURANCE-WORK ON A GOVERNMENT INSTALLATION
(APR 1984)

"(a) The contractor shall, at its own expense, provide and maintain during the entire performance period of this contract at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in the contract. 1/

1/ FAR, 48 C.F.R. § 28.306(b) provides that when this clause is required by § 28.310 the coverage specified in § 28.307 is the minimum insurance required and shall be included in the contract Schedule or elsewhere in the contract. In addition to other types of coverage not at issue here, § 28.307-2 includes workers' compensation and employer's liability insurance requirements.

"(b) Before commencing work under this contract, the Contractor shall certify to the Contracting Officer in writing that the required insurance has been obtained. . . .

"(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. . . ."

The threshold question in this case is whether the protesters are "interested parties" in the procurement, which is a prerequisite under our Bid Protest Regulations to our consideration of a protest.

Our consideration of protests such as this filed on or after January 15, 1985, is pursuant to the Competition in Contracting Act of 1984 (CICA) (31 U.S.C.A. §§ 3551-3556 (West. Pam. No. 3, Pt. 2, Dec. 1984)). Section 2741(a) of CICA defines an "interested party" as an "actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." This statutory definition has been incorporated in our Bid Protest Regulations implementing CICA. 4 C.F.R. § 21.0(a) (1985).

The protesters' correspondence is submitted by the president of the Northwest Forest Workers Association, on Association stationery ("an association of worker cooperatives") which organization is described by its president as "a trade association whose members are eligible to bid on the . . . solicitation." The initial protest letter and some of the other correspondence are co-signed by the president of Second Growth Forest Management, Inc., which the protesters describe as "a small business firm eligible to bid on the referenced solicitation and which often bids on similar solicitations."

The Northwest Forest Workers Association does not itself bid upon government contracts and therefore is not an "actual or prospective bidder." Since it, thus, does not fall within the statutory definition of an "interested party," its protest is dismissed. See PolyCon Corp., B-218304, B-218305, May 17, 1985, 64 Comp. Gen. _____, 85-1 C.P.D. ¶ ____.

Second Growth was not an actual bidder on this procurement but has, in effect, described itself as a "prospective bidder." We traditionally have not required a contractor who alleges that the terms of a solicitation preclude it from competing to engage in what well may be the meaningless exercise of submitting a bid in order to qualify as an "interested party" whose complaint will be heard. See, e.g., Canon U.S.A. Inc. and Swintec Corp., 64 Comp. Gen. 132 (1984), 84-2 C.P.D. ¶ 638.

As we indicated above, under CICA the definition of "interested party" includes a ". . . prospective bidder . . . whose direct economic interest would be affected by the award of the contract or by failure to award the contract." We interpret the latter provision, consistent with our precedent, as not requiring a contractor actually to bid in order to qualify as an interested party if the solicitation terms complained of have the effect of excluding the protester or prejudicing its position as a bidder.

The Forest Service does not dispute that the type and dollar value of the contracts involved satisfy the criteria contained in 48 C.F.R. § 28.310, but maintains that national forests are "government lands," not "government installations," and that it therefore is not required to include the insurance clause in the solicitation. In this regard, the Forest Service notes that provision H-15 of the IFB entitled "Oregon Farm/Forest Labor Contractor's License" requires the contractor, prior to the issuance of the Notice to Proceed, to provide proof that it possesses such a license from the state of Oregon. The Forest Service advises that in order to obtain a Farm/Forest Labor Contractor's License from the state of Oregon, applicants must present proof that workers' compensation insurance will be provided. The contracting officer asserts that the state requirement for insurance coverage is tantamount to a certification by the state that licensees are in full compliance with applicable state law. Therefore, the Forest Service concludes, bidders responding to the invitation do so on an equal basis with respect to the cost associated with obtaining and/or maintaining workers' compensation insurance coverage.

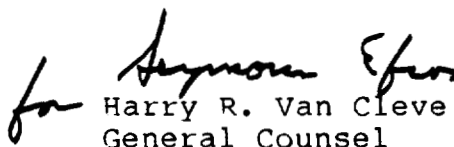
Second Growth concedes that before a Notice to Proceed is issued under any contract awarded pursuant to this IFB, the contractor must present proof that it has an Oregon Farm/Forest Labor Contractor's License and that in order to be eligible for such a license, an applicant must show that

workers' compensation insurance will be provided on each individual as required by state statute. The protester asserts, however, that "despite state requirements to maintain coverage, contractors are known to avoid or evade coverage" and, therefore, for the reasons advanced by the protester and--in its view--as required by § 28.310 of the FAR, it contends that for contracts such as this the federal government should take responsibility for making the provision of workers' compensation insurance a specific contractual requirement.

We do not think it necessary for us to decide whether the FAR provision should have been included in this solicitation, since we find no prejudice in any event.

The solicitation as issued requires any successful bidder to possess a specific state license which may be obtained only if the applicant presents proof to the state of Oregon that workers' compensation insurance will be provided. The alleged defect in the solicitation is that it does not, in addition, make it an express contractual requirement that the contractor obtain and maintain workers' compensation insurance during the performance of the contract and to prove that it has such coverage before it is permitted to begin work. The difference is between the federal government's requiring its contractor to possess a state license which evidences compliance with the state's workers' compensation law and the federal government's requiring such insurance. The unfair competition which Second Growth indicates results from this situation is that the protester cannot comply with state law yet be price competitive with those who do not and it asserts that this inequality would be remedied if maintenance of workers' compensation insurance were made a contractual requirement.

In view of the fact that the solicitation already includes a provision requiring the contractor to possess a particular state license evidencing compliance with the state workers' compensation law, however, the extent of the competitive disadvantage to which the protester believes it may be put as the result of others' disregard of state law in the absence of a specific contractual requirement on the subject is too speculative and remote to warrant our resolution of whether the solicitation should be amended as the protester contends. Second Growth's protest is denied.


for Harry R. Van Cleave
General Counsel